

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF KENTUCKY PIONEER)	CASE NO.
ENERGY, L.L.C. FOR DECLARATORY ORDER)	2000-075

O R D E R

The Commission has before it the application of Kentucky Pioneer Energy, L.L.C. ("Pioneer Energy") requesting a formal determination that it will not be a utility as defined in KRS Chapter 278 or otherwise subject to the certification requirements of KRS 278.020(1) and 278.025 as a result of constructing, owning, and operating electric generating facilities.

Pioneer Energy is a limited liability company organized under the laws of Delaware and headquartered in Cincinnati, Ohio. Pioneer Energy is a wholly-owned subsidiary of Global Energy Inc. and is qualified to do business in Kentucky.

Pioneer Energy proposes to construct, own, and operate a synthetic gas-fired, combined cycle base load power plant having a total electric generating capacity of 540 MW. The Pioneer Energy facility will be located near Trapp in Clark County, Kentucky, on land leased from East Kentucky Power Cooperative, Inc. ("East Kentucky") at its Smith Generating Station. The facility is estimated to be in operation by January 2003. It will be connected to an existing gas supply at the site and will be electrically interconnected with East Kentucky.

The Pioneer Energy project represents a capital investment of approximately \$550 million and will be licensed by the Federal Energy Regulatory Commission (“FERC”) as an exempt wholesale generator (“EWG”). All electricity produced will be sold exclusively at wholesale to East Kentucky, with no sales being made directly to retail customers in Kentucky or elsewhere. The project will include the off-site production of a fuel briquette composed of Kentucky coal blended with refuse-derived fuel. The briquettes will be stored on-site where they will be gasified into synthetic gas to fuel conventional gas turbine generators operated in combined cycle mode. In addition to operating on synthetic gas, the turbine generators will operate on natural gas as a backup fuel or in combination with synthetic gas.

The rates, terms, and conditions of sale established by Pioneer Energy will be subject to review and approval by FERC, and the construction and operation of the facilities will be subject to regulation by local, state, and federal environmental agencies.

In general, a public utility has been characterized as follows:

As its name indicates, the term “public utility” implies a public use and service to the public; and indeed, the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. There must be a dedication or holding out, either express or implied, of produce [sic] or services to the public as a class. The term precludes the idea of service which is private in its nature and is not to be obtained by the public....

64 Am.Jur.2d Public Utilities, § 1. There exists no presumption that a person is subject to regulation as a utility merely because that person is providing what is traditionally characterized as utility products or services. To the contrary, the general rule of law is that:

A dedication of private property of an electric power company to a public utility service will not be presumed from the fact that the product of such property is the usual subject matter of utility service, nor does such presumption arise from the sale by private contract of such product and service to utility corporations for purposes of resale. Such dedication is never presumed without evidence of unequivocal intention.

27A Am.Jur.2d Energy and Power Sources, § 195. Here, the intent of the Applicant must be determined from the record.

The Kentucky Public Service Commission law defines an electric utility as follows:

[A]ny person except a city, who owns, controls, or operates or manages any facility used or to be used for or in connection with:

(a) The generation, production, transmission, or distribution of electricity to or for the public, for compensation, for lights, heat, power, or other uses....

KRS 278.010(3)(a). Based on the facts set forth in the application, the Commission finds that Pioneer Energy is a person that intends to own, control, and operate a facility for the generation of electricity for compensation for uses including lights and power. Thus, the critical factor in determining the Applicant's status as a utility under KRS Chapter 278 is whether the generation and sales of electricity will be "to or for the public."

The Commission recently reviewed and analyzed this same issue in Case No. 99-058, In Re: Petition of Calvert City Power I, L.L.C. For Declaratory Order ("Calvert City"). By Order dated July 6, 1999, the Commission declared that a generating facility would not be a utility under KRS Chapter 278 if it is classified as an EWG; if its output will be sold to an affiliated wholesale marketer; if there will be no

sales to retail customers; and if it has no existing contracts to sell power to Kentucky jurisdictional utilities and no existing expectation to enter into such contracts. The Commission stated in that Order that these jurisdictional issues should be decided on a case-by-case basis.

A review of the facts and circumstances presented here and those in Calvert City and other similar applications by merchant generating plants reveals some similarities along with some significant differences. Here, Pioneer Energy has no existing contracts, or the expectation to enter into contracts, to sell power at retail to Kentucky consumers for ultimate consumption or to make any retail sales in other jurisdictions. However, Pioneer Energy does have a long-term contract to sell its total electrical output to a jurisdictional utility, East Kentucky, for resale ultimately to retail customers in Kentucky. Thus, East Kentucky will have a contractual right to the output of the Pioneer Energy project. But such a contractual right, held by one wholesale electric customer, is not sufficient evidence of an intent to serve the public or of a dedication of private property to a public use. Therefore, Pioneer Energy has no intent to directly or indirectly serve an indefinite public, to dedicate or hold its generation out as available to the public as a class, or to serve any end-users in Kentucky or elsewhere.

In addition, there are no policy reasons to justify the Commission regulating Pioneer Energy as a utility. Any concerns that the generating facilities it will construct may be unneeded or result in wasteful duplication are being investigated as part of a

separate application by East Kentucky for approval of its long-term power contract with Pioneer Energy.¹

Furthermore, Pioneer Energy will not qualify as a retail electric supplier as that term is defined by KRS 278.010(4). It does not possess a certified territory as established by the Territorial Boundary Act, KRS 278.016-278.018, and it will not be furnishing electric service to any consumer for ultimate consumption. Consequently, Pioneer Energy will have no legal right to provide retail electric service directly to any consumer for ultimate consumption.

In conclusion, the Commission finds that Pioneer Energy will not be a utility subject to our regulatory jurisdiction. No certificates of public convenience and necessity or of environmental compatibility, under KRS 278.020(1) and 278.025, respectively, need be obtained to construct the proposed gas-fired peaking power plant. However, notwithstanding the absence of jurisdiction over the construction and operation of this electric generating facility, the Commission may have jurisdiction over any gas pipeline constructed, owned, or operated by Pioneer Energy. Such jurisdiction arises from the Commission's contractual agreement to perform construction and safety inspections for the United States Department of Transportation, Office of Pipeline Safety.

IT IS THEREFORE ORDERED that the request of Pioneer Energy for a Declaratory Order is granted. Pioneer Energy will not be a utility or a retail electric supplier as defined by KRS 278.010(3)(a) and 278.010(4), and will not be subject to the

¹ Case No. 2000-079, In the Matter of the Application of East Kentucky Power Cooperative, Inc. for Approval to Purchase Power Agreement.

certification requirements of KRS 278.020(1) and 278.025, as a result of constructing, owning, or operating the facility as described in its application.

Done at Frankfort, Kentucky, this 13th day of July, 2000.

By the Commission

ATTEST:


Executive Director